SUPREME COURT, U. S.

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1551

DELOY C. ROSS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOHN L. INGOLDSBY
918 - 16th Street, N.W.
Washington, D.C. 20006

WILLIAM G. SPENCER
918 - 16th Street, N.W.
Washington, D.C. 20006

JOSEPH J. TETTICO
130 West Kirby Street
Lake Charles, Louisiana 70601

June 9, 1975

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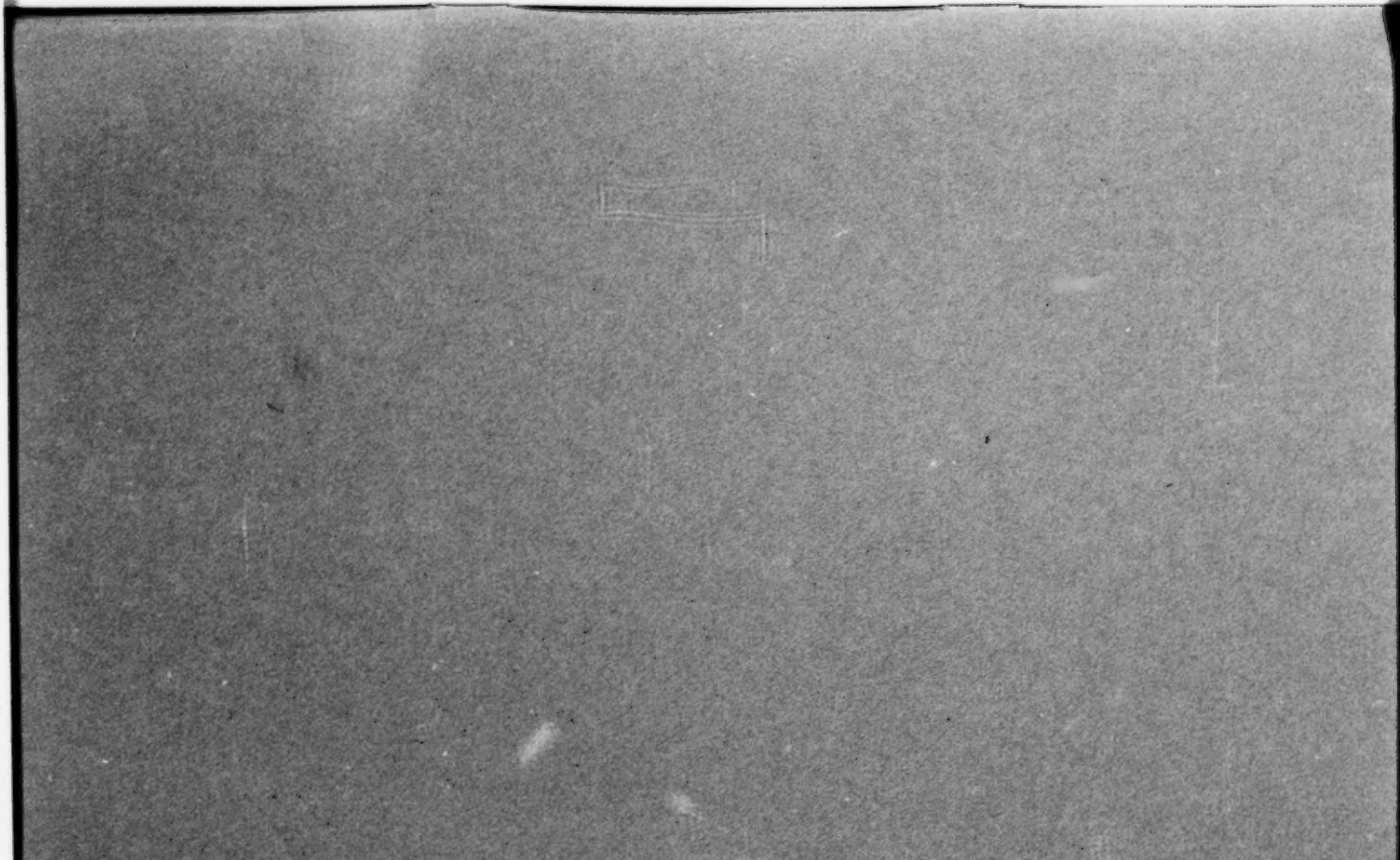

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The petitioner Deloy C. Ross respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on April 21, 1975, rehearing denied May 16, 1975. A stay of mandate was issued by the Court of Appeals for the Fifth Circuit pending appeal to this court no later than June 15, 1975.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix A attached hereto. No opinion rendered by the District Court for the Western District of Louisiana is reported.

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JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on April 21, 1975. The petition for rehearing *en banc* was denied on May 16, 1975, and this petition for certiorari was filed within 30 days of that date. The court's jurisdiction is invoked under 28 USC § 1254(1).

QUESTIONS PRESENTED

1. Is it reversible error for the District Court to permit the Government to obtain from a third party thief documents which are the property of the accused; refused to grant the rule 16(b) FRCP which motion to inspect and copy these same documents; and to permit the Government to use on a selective basis these same documents against the accused at the time of trial?

2. Is evidence stolen by a third party during a Government criminal investigation which was then obtained under circumstances not shown to be "voluntary" excludable under the Fourth Amendment pursuant to *Knoll Associates, Inc.* v. *FTC*, 397 F 2d 530 (7th Cir. 1968)?

3. Is the Government required to show that stolen evidence, both that which is introduced at trial and that which is withheld from defense inspection, obtained from a third party thief, is acquired with the third party's consent and not mere acquiescence under *Bumper* v. *North Carolina*, 391 US 543, 88 S.Ct. 1788 (1968)?

4. Is the Government's secret withholding of stolen evidence from a third party thief during a criminal investigation a violation of due process under the Fifth Amendment?

STATUTORY PROVISIONS INVOLVED

United States Code, Title 18:

§ 3771 Rule 16(b) of the Federal Rules of Criminal Procedure

The rule reads as follows:

> Upon motion of a defendant the court may order the attorney for the government to permit the defendant to inspect and copy or photograph books, papers, documents, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, upon a showing of materiality to the preparation of his defense and that the request is reasonable. Except as provided in subdivision (a)(2), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by government agents in connection with the investigation or prosecution of the case, or of statements made by government witnesses or prospective government witnesses (other than the defendant) to agents of the government except as provided in 18 U.S.C. § 3500.

CONSTITUTIONAL AMENDMENTS INVOLVED

Fourth Amendment, United States Constitution

The Fourth Amendment reads as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fifth Amendment, United States Constitution

The Fifth Amendment reads as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

STATEMENT OF THE CASE

The petitioner, defendant in the United States District Court for the Western District of Louisiana, Deloy C. Ross, was in 1973 charged by indictments with filing a false and fraudulent income tax return and with willfully attempting to evade income tax due on behalf of himself and his wife for the years 1966, 1967 and 1968, and was indicted for the same offense for the years 1968 and 1969 in connection with his activities in Ross Investments, Inc., a corporation (26 U.S.C. 7201). The defendant was tried before a jury in the Western District of Louisiana and on June 7, 1974 the jury found the petitioner guilty on all counts.

The Government's case against the defendant Ross was based entirely upon the well-known and much used net worth theory. The defendant Ross asserted the affirmative defense that any unexplained increase in his net worth during the years in question was not the result of any willful evasion or nonpayment of income taxes due to the Internal Revenue Service, but was due to the re-

ceipt of gifts from his father, W. C. Ross, prior to the time of his father's demise in March 11, 1969.

At the time of the father's death, Deloy Ross, the defendant below, became the owner of all of his father's books, records and papers. During the pretrial stage, indeed during the pre-indictment stage which commenced May 6, 1969, the petitioner Ross repeatedly made his position known to IRS agents and to the U.S. Attorney, by documents submitted, by conferences and by telephone calls. From the beginning there was never any question or doubt but that the petitioner admitted to an increased net worth and asserted that the increase was due in substantial part to gifts which he had received from his father. The petitioner Ross having asserted this theory of increased net worth realized, with the advice of counsel, that he was asserting an affirmative defense and it was therefore incumbent upon him to establish the validity of this defense.

The petitioner Ross in order to establish an affirmative defense assembled all of his own books, records and accounting reports, as well as other material data, and had all of this material analyzed and evaluated by competent accountants and with the assistance of his own counsel prepared this material in such a manner as to be presented at his trial in order to produce its maximum evidentiary value for the petitioner. Having adopted this theory of defense, Ross and his counsel realized that they indirectly placed in issue petitioner's father's net worth for each material year. During the investigation of the petitioner, a William Taylor in 1970 took from one of Deloy Ross' properties numerous business records, referred to in testimony on the motion for a new trial in the District Court as a "carload and a truckload" of the petitioner's documents and records. Most of these records were documents that formerly belonged to the father of the petitioner but which the petitioner had inherited.

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The records stretched back to the early forties and late fifties. During the investigatory period the petitioner was not entirely sure where or how these documents had disappeared. It was not learned by petitioner and his counsel until during the trial on May 29, 1974 that the stolen documents were turned over to agents of the IRS and that for over three years the petitioner's property was therefore directly or indirectly within the possession and control of the U.S. Attorney.

In preparation for trial and in order to obtain all available documents which might assist the defendant in establishing his affirmative defense, counsel for the defendant Ross filed a motion pursuant to 16(b) of the Federal Rules of Criminal Procedure for discovery and inspection of:

A. All books, records, papers, documents, photographs, tangible objects and material obtained from or belonging to the accused;

B. Copies of all books, records, papers, documents, photographs, tangible objects and material obtained from or belonging to the accused;

C. All books, records, papers, documents, tangible objects and material from whomsoever obtained which are favorable to the accused on the issue of his guilt or punishment and which will aid him in the preparation of his defense;

D. All books, records, papers, documents and physical material which the Government intends to offer as evidence in this case.

The Fifth Circuit Court of Appeals in its opinion finds and contends that this motion was granted. It is indisputable that the Government did not turn over for discovery or inspection all the documents called for by the defendant's 16(b) motion, and there is no dispute but what the defendant Ross in the District Court did

not have the benefit of use, or even of inspection, of these records which were in possession of the Government.

Thereafter, during the trial in the District Court the U.S. Attorney selectively introduced 24 out of 144 monthly profit and loss statements; the very same documents which the defendant had sought to obtain by his rule 16(b) motion. These documents were introduced into evidence against the petitioner over the general objection of his counsel. (The record does not clearly indicate how the District Court treated the government's objection to this objection.) It was only then that he saw for the first time some of the very documents which he had sought to obtain by pretrial motion and learned for the first time who had stolen them. From that point on the thief of the documents was absent evidently by "design".

In arguing the rule 16(b) motion in the District Court, the defendant Ross was at an extreme disadvantage from the standpoint of establishing the materiality of the very documents which he was seeking to obtain. In effect, he and his counsel had to be able to see the documents in order to establish their materiality or be blessed with a remarkable memory because after all most of the stolen documents were originally his father's documents or kept by him as his son's employee, and he therefore did not have the same familiarity with the contents of the documents as his father would have had, had he been alive. Nevertheless, any of the petitioners own documents in a complex tax case are not readily reconstructed from memory. One quick test of the materiality of the documents which were being sought under rule 16(b) can be established by the fact that the U.S. Attorney found some of the documents to be extremely material. In fact, they were so vitally material that the U.S. Attorney used them in evidence against the defendant Ross.

Subsequent to the entry of the jury's guilty verdict the defendant's counsel filed a motion for a new trial and a

hearing was had thereon. It was at this time that counsel for the petitioner learned that four boxes of stolen documents were still in possession of the Government. The court received the documents and placed them under seal after a brief secret examination. One of the principal grounds asserted in support of the motion for a new trial was the fact that at no time prior to trial, nor during trial, was the defendant Ross permitted to inspect or use his own documents. It was the contention of the defendant Ross that had he had access to the documents in question, he would have been able to establish to the satisfaction of the jury that the unexplained increase in his net worth during the years in question was, in fact, the result of substantial gifts from his father. The motion for new trial was denied.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW CREATES CONFLICTS AMONG THE CIRCUITS WITH REGARD TO THE APPLICATION OF DISCOVERY UNDER RULE 16 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE.

The Circuit Court of Appeals for the District of Columbia recognizes that denial of a reasonable discovery request for no good reason "cannot be excused as an exercise of the trial judges discretion under the Rule." *United States* v. *Bushton*, 463 F 2d 887, 983 (1972). The court in so observing referred to *United States* v. *Bryant*, 439 F 2d 642 (1971) a case involving 16(a) discovery.

One's private financial records can, depending on the individual, be vast and complex. Memory alone cannot catalogue and retain their every significance, particularly with regard to the complexities of the tax laws. Without discovery and inspection as provided for by rule 16(b),

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the petitioner was unable to properly prepare for trial. The documents stolen during the Government's investigation could not be reconstructed to use himself or to counter inferences that might be derived from them. The evidence still under seal might as well be lost or destroyed as far as the petitioner is concerned.[1]

The court, through Judge Skelly Wright, in *United States* v. *Bryant* observed with regard to the prosecution's disclosure study:[2]

> The purpose of the duty is not simply to correct an imbalance of advantages, whereby the prosecution may surprise the defense at trial with new evidence; rather, *it is also* to make of the trial a search for truth informed by all relevant material, much of which, because of inbalance in investigative resources, will be exclusively in the hands of the government (citation omitted, emphasis supplied).

And with regard to evidence to which one is left, "entirely in the dark," the court said:[3]

> There is not simply 'substantial room for doubt'[4] but room for nothing except doubt as to the effect of disclosure.

The case was remanded.

Even if the discovery motion had been granted entirely, the government failed to abide by it. In so doing the government gravely violated the rights secured to the petitioner under this rule for a reasonable inspection of his own property which was material to his trial and his defense. In *Bass* v. *United States*, 239 F 2d 711 (6th Cir 1957) the court held that the defendant should have

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[1] *C.f. United States* v. *Heath*, 260 F 2d 623 (9th Cir. 1958), in which evidence was destroyed and the directed verdict of acquittal was upheld.

[2] 439 F 2d at 648.

[3] *Ibid.*

[4] See footnote 8 and text 439 F 2d at 648.

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been entitled to inspection of evidence obtained from a third party belonging to him and said:

> Appellant had a right equal to that of the government to use the same documents in the same way to prepare for trial. A denial of this right calls for reversal.[5]

Rule Sixteen was changed in 1966 and in subdivision (b) "obtained from or belonging to the defendant or obtained from others by seizure or by process" was omitted. These limitations were eliminated to broaden the scope of discovery not to limit it.[6]

The standard of materiality and reasonableness cannot be met by a defendant where there is a vast amount of documents which the Fifth Circuit seems to feel should be computerized in defendants own "knowledge". In a complex networth tax case materiality of documents requires time and careful analysis.[7] The court in *United States* v. *Tanner*, 279 F Supp 457 (N.D. Ill 1967) quoted from a learned law review article[8] by Mr. Daniel Rezneck on this subject which in substance pointed out that:

> . . . [I]t may be difficult to demonstrate the materiality of what has not been seen.
>
> Anything the government plans to introduce against the defendant at trial would obviously be material to the preparation of his defense and a request to inspect it would be reasonable. . . .
>
> Reasonableness is a closely related requirement [to materiality]. A request for items material to

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[5] At 716. See e.g. *United States* v. *Fancher*, 195 FS 448, 450 (D. Conn 1961); *United States* v. *Cohen*, 15 FRD 269 (S.D. N.Y. 1953); *United States* v. *Parr*, 17 FRD 512 (S.D. Tex. 1955); *United States* v. *Bennethum*, 21 FRD 227 (D. Del. 1957); *United States* v. *Skindler*, 24 FRD 142 (S.D. N.Y. 1959).

[6] Introduction to committee note to Rule 16.

[7] *United States* v. *Tanner*, 279 F Supp. 457, 470 (N.D. Ill 1967).

[8] 54 GEO. L. J. 1276, 1279-1290 (1966).

> the preparation of the defense would ordinarily be reasonable, unless, for example, the defendant already had some other access to the matters sought.

In the instant case, memory concerning the contents of the petitioner's documents as well as ignorance of the details of documents once belonging to the petitioner's father effectively created a situation wherein the defendant might as well have never seen the documents. It is absurd to say that it is within his knowledge that documents stretching back over 20 years should be intimately "known". Of course, as Mr. Rezneck points out, those documents introduced are inherently material and it is only reasonable to request discovery of support documents in preparation for trial in order to refute contrary conclusions the Government should use or make. As the court said in *United States* v. *Procareo*: [9]

> . . . [I]t is difficult to understand how a defendant can, in advance of trial, adequately prepare to meet the charge unless he has access to basic records.

In addition, it is somewhat outrageous that the district court could examine secretly in thirty minutes four cases of documents that would take an accountant an extensive amount of time to analyze [10] and then declare the material only non-exculpatory.

The Second Circuit has recognized the need for fairness with regard to subdivision (a) of Rule Sixteen.[11] As with those cases, the tactics of the Government in this case "smacks too much of a trial by ambush, in violation of the spirit of the rules." [12]

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[9] 34 FRD 486, 488 (S.D. N.Y. 1963).

[10] See *Holland* v. *United States*, 348 U.S. 121, 127, 75 S.Ct. 127, 132 (1955); *United States* v. *Shindler*, 24 FRD 142, 145 (S.D. N.Y. 1959).

[11] *United States* v. *Kelley*, 420 F 2d 26, 28-29 (2nd Cir. 1969); *United States* v. *Baum*, 482 F 2d 1325, 1332 (2nd Cir 1973).

[12] *United States* v. *Baum*, 482 F 2d at 1332.

In the Third Circuit *a much broader* discovery request than the instant case was granted, upheld, and the defendant foreclosed from the complaint that too much material was disclosed.[13] Certainly in the Fifth Circuit a request for four boxes of the defendants own property is not unreasonable.

Moreover, the Government should not be allowed to compound an illegal act during its investigation or aid and abet the commission of a crime, even if it were a crime it could not prosecute. If the United States Government can cooperate with local authorities to enforce state criminal laws, it should not on mere whim ignore a local crime to its advantage. Under the court's supervisory power over the administration of criminal justice in the Federal courts,[14] the Government should be required to proceed openly and fairly, particularly when stolen evidence is involved in its prosecution and when discovery of such evidence is material and reasonable.

By sanctioning the admissibility of privately stolen evidence and conviction thereon this court permits disrespect for the law that protects not only a person's constitutional rights but also his legal rights in his property. And where privately seized or stolen property is evidence requested by the Government, the Government should in the light of day obtain the property, thereby allowing a victimized citizen to regain what is rightfully his or at least know where his property has disappeared. Indeed, it is admirable to encourage third party citizens to be cooperative in criminal investigations of others, but not to the extent that private vigilantism is encouraged or private burglaries are encouraged. The whole purpose of law and order is otherwise defeated.

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[13] *United States* v. *Kenny*, 462 F 2d 1205 (3rd Cir 1972) cert den. 409 U.S. 914, 93 S.Ct. 233.

[14] *McNabb* v. *United States*, 318 U.S. 332, 63 S.Ct. 608 (1943).

2. THE DECISION BELOW CONFLICTS WITH THE SEVENTH CIRCUIT COURT OF APPEAL'S INTERPRETATION OF THE FOURTH AMENDMENT RIGHTS OF THE PETITIONER.

In *Knoll Associates, Inc.* v. *FTC*, 397 F 2d 530 (7th Cir. 1968) the Government during the course of its investigation of Clayton Act violations received from a third party stolen business documents belonging to the defendant. The court in its fifth footnote at page 535 distinguished *Burdeau* v. *McDowell*, 256 U.S. 465, 41 S.Ct. 574 (1921) on the observation that the *Burdeau* documents were stolen months before the initiation of the Government investigation. Consequently there was no nexus or taint of Government approval for private theft and seizure of a persons property or papers which would normally violate the Fourth Amendment as intimated by *Burdeau.*[15]

The financial records secretly in the possession of the Government belonged to Deloy C. Ross because (1) he owned the store, the land and W. C. Ross & Sons entirely since 1946 and never sold the business of or the name of W. C. Ross & Sons; (2) he maintained ownership of the documents on his property[16] even after the abandonment of the store by the caretaker of the documents; and (3) whatever portion of the stolen documents that originally were his father's he inherited from his father. The thief as a step-brother had no ownership right or interest in the documents other than the fact

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[15] 256 U.S. 465, 475, 41 S.Ct. 574, 576; *United States* v. *Harper*, 458 F 2d 891 (7th Cir 1971) cert den. 406 U.S. 930, 92 S.Ct. 1772.

[16] The Fifth Circuit Court of Appeals made a factual error in that Deloy C. Ross sold the *inventory* of W. C. Ross & Sons but he did not sell the building, land or business name to the thief. That is to say, he did *not* sell the "store". Trial Transcript page 1798. The deed to the property is recorded at Book 162 page 590, Parish of Vernon, Leesville, Louisiana.

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that prior to his abandoning the store premises [17] and his caretaker duty of the records, he had the duty of their safekeeping.[18] He had no authority to remove or consent to removal of the documents for his own use or that of the Government.[19] He had no right of "mutual use" of the documents at any time.[20] Indeed, his reentry of the abandoned store amounts to theft by unlawful entry.

The theft of Deloy Ross' financial records was during the investigation by the IRS as the Fifth Circuit Court of Appeals notes. Had Deloy Ross been accused and tried in the Seventh Circuit the evidence introduced against the petitioner would be suppressible under the Fourth Amendment and the *Knoll* decision.

In such situations where the Government takes advantage of crimes of individuals, the words of Justice Brandeis in his dissent in *Burdeau* v. *McDowell* [21] become more urgent:

> At the foundation of our civil liberties lies the principle which denies to the government officials an exceptional position before the law, and which subjects them to the same rules of conduct that are

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[17] Trial Transcript, page 1813 line 15.

[18] Trial Transcript, page 1798.

[19] It has not been established if consent was "voluntarily" given or if there was trick or coercion vis a vis the thief with regard to the documents still withheld. See reason #3 below.

[20] *Matlock* v. *United States*, 415 U.S. 164, 171, 94 S.Ct. 988 (1974) at footnote 7: "Common authority is, of course, not to be implied here from the mere property interest a third party has in the property. The authority which justifies the third party consent does not rest upon the law of property, with its attendant historical and legal refinements, . . . (citation omitted) but rests rather on *mutual use* of the property by persons generally leaving joint access or control *for most purposes*, so that it is reasonable to recognize that any of the coinhabitants has the right to *permit inspection in his own right*. . . . (emphasis supplied)

[21] 256 U.S. at 477, 41 S.Ct. at 576-577.

commands to the citizen. And in the development of our liberty, insistence upon procedural regularity has been a large factor. *Respect for law will not be advanced by resort, in its enforcement, to means which shock the common man's sense of decency and fair play.* (emphasis supplied)

3. THE FIFTH CIRCUIT DECISION BELOW IS IN CONFLICT WITH THE DECISION OF THIS COURT REQUIRING THAT THE GOVERNMENT SHOW THAT EVIDENCE OBTAINED FROM A THIRD PARTY THIEF WAS OBTAINED VOLUNTARILY AND WITHOUT MERE ACQUIESCENCE.

As this court has reiterated in *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 223, 93 S.Ct. 2041, 2045 (1973), when the Government relies on the consent of a third party to justify the lawfulness of a search, the Government "has the burden of proving that the consent was, in fact, freely and voluntarily given" without mere acquiescence *Bumper* v. *North Carolina*, 391 U.S. 543, 548-549, 88 S.Ct. 1788, 1792 (1968). With regard to documents still withheld from the petitioners inspection, the Government did not so show this because the one person able to testify as to the voluntariness of the consent to the IRS search and seizure, the thief, disappeared before his significance was realized. Considering his theft it is understandable why he did. And there is no indication that the Government searched for the witness—undoubtedly conduct favoring his theft and unlawful entry. With regard to the evidence stolen which was admitted, these were evidently received from the thief's attorney but this is not entirely clear.

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4. THE GOVERNMENT'S OBTAINING PETITIONER'S DOCUMENTS FROM A THIRD PARTY THIEF IS A VIOLATION OF HIS RIGHT TO DUE PROCESS OF LAW UNDER THE FIFTH AMENDMENT.

In *Gouled* v. *United States*, 225 U.S. 298, 41 S.Ct. 261 (1921) this court said that the bill of rights "should receive a liberal construction, so as to prevent stealthy encroachment upon or 'gradual depreciation' of the rights secured by them, by imperceptible practice of courts, or by well intentioned but mistakenly over-zealous executive officers." [22] In the present case the Government has taken advantage of a crime in order to rob the petitioner of due process.

In *Joint Anti-Fascist Refugee Committee* v. *McGarth*, 341 U.S. 123, 71 S.Ct. 624 (1951) Justice Frankfurter in his concurring opinion made some basic observations about "the deep-rooted demands of fair play enshrined in the Constitution." In that case the Committee was designated communist "without notice, without disclosure of any reasons justifying it, without opportunity to meet the undisclosure evidence or suspicion on which designation was may have been based, and without opportunity to establish affirmatively that the aims and acts of the organization are innocent." [23] All this was "devoid of fundamental fairness as to offend the Due Process Clause of the Fifth Amendment."

Justice Frankfurter expounds:[24]

> ". . . [D]ue process", unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances expressing as it does in its untimate analysis respect enforced by

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[22] 225 U.S. at 304, 41 S.Ct. at 263.

[23] 341 U.S. at 161, 71 S.Ct. at 643.

[24] 341 U.S. at 162-3, 71 S.Ct. at 643-4.

> law for that feeling of just treatment. . . . "Due process" cannot be imprisoned within the treacherous limits of any formula. Representing a profound attitude of fairness between man and man, and more *particularly between the individual and government*, "due process" is compounded of history, reason, the past course of decision and stout confidence in the strength of the democratic faith we profess. Due process is not a mechanical instrument. It is not a yardstick. It is a process. It is a delicate process of adjustment inexcapably involving the exercise of judgment by those whom the Constitution entrusts with the unfolding of the process. (emphasis supplied)

In the instant case the petitioner's property was taken twice: once by a third party thief and then by the Government. The later, like the thief, took that evidence introduced into trial without disclosure of any legal reasons justfying such taking of his property and that evidence which is still suppressed left the petitioner without opportunity to meet or use his secretly held property. In short the petitioner is deprived the opportunity to prepare his defense, and such deprivation was without due process.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

/s/ John L. Ingoldsby

JOHN L. INGOLDSBY
918 - 16th Street, N.W.
Washington, D.C. 20006

June 2, 1975

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CERTIFICATE OF SERVICE

I hereby certify that on this 2d day of June, 1975, three copies of the Petition for writ of Certiorari were mailed, postage prepaid, to Mr. Robert H. Bork, Solicitor General of the United States, Justice Department, Washington, D.C. 20530.

/s/ John L. Ingoldsby

JOHN L. INGOLDSBY
Suite 201
918 16th Street, N.W.
Washington, D.C. 20006
Counsel for Petitioner